a higher or lower price to the BOC.[510] We recognize, as Sprint and Time Warner suggest, there will be some instances where the costs of providing certain goods, services, or facilities to its affiliate and to an unaffiliated entity differ.[511] As we stated in the First Interconnection Order, where costs differ, rate differences that accurately reflect those differences are not unlawfully discriminatory.[512] Strict application of the section 272(c)(1) prohibition on discrimination would itself be discriminatory if the costs of supplying customers are different.[513] Similarly, we also conclude, as we did in the First Interconnection Order, that "price differences, such as volume and term discounts, when based upon legitimate variations in costs, are permissible under the 1996 Act when justified."[514]

C. Definition of "Goods, Services, Facilities and Information" in Section 272(c)(l)

1. Background

213. In the Notice we sought comment on the interplay among the definitions of the terms "services," "facilities," and "information" in various subsections of 272, and between section 272 and section 251(c). We also sought comment on what regulations, if any, are necessary to clarify the types or categories of services, facilities, or information that must be made available under section 272(c)(l). We asked parties to comment on whether further defining the terms "goods," "services, " "facilities," and "information" would enable competing providers to detect violations of this section by enabling them to compare more accurately a BOC's treatment of its affiliate with a BOC's treatment of unaffiliated competing providers.[515]

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[510] See AT&T at 33 (Commission should make explicit that any difference in treatment between BOC affiliates and their competitors is unlawful unless it results from a competitor's deliberate choice to receive different or less favorable treatment in exchange for lower prices); PacTel Reply at 12-13 (if an unaffiliated entity wants something different than the BOC affiliate, the other entity should request something different, instead of requiring BOC to figure out what entity needs to get the same end result as affiliate).

[511] Sprint at 39-40; Time Warner at 22.

[512] First Interconnection Order at ¶ 860.

[513] See BellSouth at 32 (a blanket prohibition on discrimination when justified by differences in cost would be anticompetitive); see also id. ("Strict application of the term 'nondiscriminatory'. . . would itself be discriminatory according to the economic definition of price discrimination. If the 1996 Act is read to allow no price distinctions between companies that impose very different . . . costs on LECs, competition for all competitors, including small companies, could be impaired.").

[514] First Interconnection Order at ¶ 860.

[515] Notice at ¶ 67.

2. **Comments**

214. PacTel, U S West, and NYNEX urge the Commission to exclude administrative and support services from the scope of the term "services" in section 272(c)(1).[516] Similarly, U S West maintains that a BOC should not be required to provide non-telecommunications goods, services, facilities, and information.[517] TIA urges the Commission to construe the terms "goods" and "services" to encompass, at a minimum, all types of telecommunications equipment, CPE, and related software and services.[518] Sprint asserts that the term "service" in section 272(c)(l) should encompass at least telecommunications and information services, and that the term "facilities" should include all unbundled elements required under section 251(c)(3).[519] CIX maintains that, because the terms in section 272(c)(l) are not conditioned or qualified in any manner, "facilities, services and information" should be interpreted to encompass the meaning of those terms as used in section 251(c).[520]

215. Sprint argues that, because the term "information" in section 272(e)(2) is limited to information "concerning [a BOC's] provision of exchange access," the Commission should place no limit on the meaning of "information" as used in section 272(c)(1).[521] Several commenters disagree on whether the term "information" under section 272(c)(l) includes CPNI. PacTel and U S West contend that, because the Act includes a separate provision covering CPNI,[522] the term information in section 272(c)(1) must exclude CPNI.[523] They argue, therefore, that section 272(c)(l) does not require a BOC to provide CPNI to other entities when the BOC provides it to its section 272 affiliate. AT&T and MCI, in contrast, argue that section 272(c)(l) should include CPNI to ensure that a BOC will not use, disclose, or permit access to CPNI of

[516] NYNEX at 34-35; PacTel at 30; U S West at 36-37 (BOCs have no monopoly over the provision of administrative and support services so if these are withheld from competitors, this will not force those competitors from the market). But see Frontier at 6 (Commission should interpret the phrase "facilities, services, or information" to include not only tariffed access elements, but also the provision of non-tariffed services and information such as business office services, computing services, customer information, and the like).

[517] U S West at 37; see also PacTel Reply at 17 (section 272(c)(l) is limited to regulating goods and services that are part of a common carrier service).

[518] TIA at 33.

[519] Sprint at 32-34; see also id. at 34 n.23 ("facilities" under section 272 may include not only section 25 1(c)(2) "facilities" but also the "network equipment" referred to in section 25 l(c)(2)).

[520] CIX Reply at 6.

[521] Sprint at 34-35.

[522] 47 U.S.C. § 222; see CPNI NPRM.

[523] PacTel Reply at 16; U S West at 38; U S West Reply at 15.

BOC customers for the benefit of its separate affiliate unless the CPNI is made available to all competing carriers.[524]

3. Discussion

216. We conclude that any attempt to define exhaustively the terms "goods, services, facilities, and information" in section 272(c)(1) may unnecessarily limit the scope of this section's otherwise unqualified nondiscrimination requirement.[525] At the same time, however, we disagree with ITAA that the Commission should refrain from attempting to clarify the meaning of these terms.[526] We find instead that clarifying the types of activities these terms encompass will provide useful guidance to potential competitors that seek to avail themselves of the protections of section 272(c)(l). In enforcing the nondiscrimination requirement of section 272(c)(l), we intend to construe these terms broadly to prevent BOCs from discriminating unlawfully in favor of their. section 272 affiliates.[527]

217. We find that neither the terms of section 272(c)(l), nor the legislative history of this provision, indicates that the terms "goods, services, facilities, and information" should be limited in the manner suggested by some commenters. We therefore decline to interpret the terms in section 272(c)(l) as including only telecommunications-related or, even more specifically, common carrier-related "goods, services, facilities, and information."[528] Similarly, we reject arguments set forth by NYNEX, PacTel, and U S West that the term "services" should exclude administrative and support services. Although NYNEX contends that, as a practical matter, unaffiliated entities are unlikely to avail themselves of such services,[529] we find that there are certain administrative services, such as billing and collection services, that unaffiliated entities

[524] AT&T at 34; AT&T Reply at 24-25; MCI at 38 (section 272(c)(1) should apply to CPNI to ensure that BOCs do not impose more demanding requirements on unaffiliated entities than they impose on their affiliates).

[525] See ITAA at 21. As U S West observes, in interpreting section 272(c)(l), we are determining the scope of the goods, services, facilities, and information that are subject to the nondiscrimination requirement. U S West at 32; see also ISA at 3 (maintaining that section 272(c)(l) should he interpreted to ensure that a BOC does not provide or procure any good, service, facility, or information in a manner that could adversely affect competition on the information services industry).

[526] See ITAA at 21.

[527] See id.

[528] See, e.g., U S West at 37 (contending that section 272 cannot logically be read as requiring a BOC to provide non-telecommunications-related items, over which it has no monopoly, to an unaffiliated entity simply because it has provided that item to a separate affiliate); PacTel Reply at 17 (arguing that the terms of section 272(c)(l) should be limited to goods and services that are part of a common carrier service regulated under Title II of the Act).

[529] NYNEX at 34.

may find useful.[530] Further, as discussed above, we construe the term "services" to encompass any service the BOC provides to its section 272 affiliate, including the development of new service offerings.[531]

218. We conclude therefore that the protection of section 272(c)(1) extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate. For example, we find that if a BOC were to decide to transfer ownership of a unique facility, such as its Official Services network, to its section 272 affiliate, it must ensure that the transfer takes place in an open and nondiscriminatory manner.[532] That is, pursuant to the nondiscrimination requirement of section 272(c)(l), the BOC must ensure that the section 272 affiliate and unaffiliated entities have an equal opportunity to obtain ownership of this facility.

2 19. We also conclude that the terms "services," "facilities," and "information" in section 272 should be interpreted to include, among other things, the meaning of these terms under section 251(c). The term "facilities," therefore, includes but is not limited to the seven unbundled network elements described in the First Interconnection Order.[533] We decline to limit the scope of these terms to their meaning in section 251 because section 272 encompasses a broader range of activities than does section 25 1. We also emphasize that in contrast to section 251, where an incumbent LEC is prohibited from discriminating against any requesting telecommunications carrier, section 272(c)(l) prohibits BOCs from discriminating against "any other entity." Because section 272 does not define the term "entity," we interpret this unqualified term broadly to ensure that all competitors may benefit from the protections of section 272(c)(l). Thus, we agree with Sprint that this term should include the definition of the term "entity" as set forth in the electronic publishing section of the Act;[534] however, we also find it appropriate to include within the meaning of "entity" the providers of the activities encompassed by section 272. We conclude, therefore, that the term "entity" includes telecommunications carriers, ISPs, and manufacturers.

220. We disagree with ATSI and CIX, however, that by interpreting "any other entity" to include information service providers and by concluding that the term "facilities" in section 272(c)(1) encompasses the meaning of that term as it is used in section 25 1 (c), ISPs acquire the

[530] See ISA at 3 (stating that the discriminatory provision of billing and collection services could adversely affect competition in the information services market).

[531] See supra at paragraph 210.

[532] See discussion of Official Services network infra patt VI.D.

[533] These include the local loop, the network interface &vice, switching capability, interoffice transmission facilities, signalling networks and call-related databases, operations support system functions, and operator services and directory assistance. See First Interconnection Order, Appendix B, at 20-24.

[534] Sprint at 37. Section 274 provides that "the term 'entity' means any organization, and includes corporations, partnerships, sole proprietorships, associations, and joint ventures." 47 U.S.C. § 274(i)(6).

right to obtain unbundled access to the local loop and other network elements whenever BOCs provide their section 272 affiliates with such access.[535] Pursuant to section 251(c)(3), only telecommunications carriers providing a telecommunications service are entitled to obtain access to unbundled network elements. Because ISPs may only obtain access to unbundled elements pursuant to section 251 to the extent they are providing telecommunications services,[536] we conclude that they may not attempt to circumvent the limitations of section 251 by virtue of their rights under section 272(c)(l). This conclusion is consistent with our finding in the Second Interconnection Order that the inclusion of information services in the definition of "services" under section 25 l(c)(5) "does not vest information service providers with substantive rights under other provisions of section 251, except to the extent that they are also operating as telecommunications carriers."[537] To the extent, however, that a BOC chooses voluntarily to provide facilities, including network elements, to a section 272 affiliate that is solely providing information services (and thus does not qualify as a telecommunications carrier under section 25 1), we conclude that a BOC must, pursuant to section 272(c)(1), provide such facilities to other requesting ISPs.

221. We therefore agree with MFS that, if a BOC chooses to allow its information service affiliate to collocate routers, servers, or other equipment, section 272(c)(l) requires that the same accommodations be extended, on a nondiscriminatory basis, to competing ISPs.[538] Collocation is a means of achieving interconnection and access to unbundled network elements that incumbent LECs, including BOCs, must provide to requesting carriers under section 25 1 .[539] Although section 251 does not require incumbent LECs to permit entities other than telecommunications carriers to collocate equipment on an incumbent LEC's premises,[540] sections 25 1 and 272 do not prohibit BOCs from voluntarily allowing ISPs to collocate equipment on their premises. Thus, we find that, if a BOC permits its section 272 affiliate to collocate facilities used to provide information services, the BOC must permit collocation, under section 272(c)(l), by similarly situated entities. If the BOC's section 272 affiliate qualifies as a "telecommunications carrier," the BOC need only permit other telecommunications carriers to collocate their equipment. If, however, the BOC's section 272 affiliate only provides information services, the BOC must permit similarly situated ISPs to collocate equipment at the BOCs premises, even if such entities do not qualify as telecommunications carriers.

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535 ATSI at 8-9; CIX Reply at 6.

536 See First Interconnection Order at ¶ 992.

537 Second Interconnection Order at ¶ 176.

538 MFS Reply at 20-21.

539 See First Interconnection Order at ¶¶ 542-617 (discussing collocation).

540 First Interconnection Order at ¶ 58 1.

222. As Sprint points out, the term "information" in section 272(c)(l) is not limited as it is in section 272(e)(2) to information "concerning [the BOC's] provision of exchange access."[541] In fact, as noted above, we find no limitation in the statutory language on the type of information that is subject to the section 272(c)(l) nondiscrimination requirement. For this reason, we reject U S West's assertion that section 272(c)(1) only governs that information which may give a separate affiliate an "unfair advantage."[542] We conclude, however, that the term "information" includes, but is not limited to, CPNI and network disclosure information.[543] We therefore reject arguments made by some BOCs that the nondiscrimination provision of section 272(c)(l) does not govern the BOCs use of CPNI. With respect to CPNI, we conclude that BOCs must comply with the requirements of both sections 222 and 272(c)(l). We decline to address parties' arguments raised in this proceeding regarding the interplay between section 272(c)(l) and section 222 to avoid prejudging CPNI issues that will be addressed in a separate proceeding.[544]

D. Establishment of Standards

1. Background

223. Section 272(c)(l) prohibits a BOC from discriminating between its section 272 affiliate and other entities in the "establishment of standards." In the Notice we sought comment on what "standards" are encompassed by this provision. We observed that a BOC may act anticompetitively by creating standards that require or favor equipment designs that are proprietary to its section 272 affiliate. We sought comment on what procedures, if any, we should implement to ensure that a BOC does not discriminate between its affiliate and other entities in setting standards. We asked parties to comment, for example, on whether BOCs should be required to participate in standard-setting bodies in the development of standards covered by section 272(c)(1).[545]

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[541] See 47 U.S.C. § 272(e)(2). Similarly, we note that the term "facilities" in section 272(c)(l) is not limited as it is in section 272(e)(4) to "interLATA or intraLATA facilities." See 47 U.S.C. § 272(e)(4).

[542] U S West at 37-38 (arguing that, if the information cannot give an unfair advantage to a separate affiliate, there is no reason under the 19% Act to interfere with its flow between the BOC and its affiliate).

[543] See, e.g., 47 U.S.C. §§ 222, 251(c)(5).

[544] See CPNI NPRM. Several BOCs assert that there are certain instances under section 222 where it would be unlawful for them to distribute CPNI to other entities. See Ameritech Reply at 29, NYNEX Reply at 13-14; PacTel Reply at 16-17; U S West Reply at 14-15.

[545] Notice at ¶ 78.

2. Comments

224. Although we received only a few comments on the meaning of the term "standards" in section 272(c)(1),[546] many parties expressed views on the need for the adoption of procedures to ensure nondiscrimination in the establishment of standards, the need for mandatory BOC participation in standard-setting, and whether the failure of BOC participation in standard-setting should be considered discrimmation. Bellcore, ITAA, and PacTel. argue it is unnecessary to adopt procedures to ensure the nondiscriminatory establishment of standards.[547] For example, Bellcore and PacTel maintain that nondiscriminatory standards-setting need not be addressed in the context of section 272(c)(l) because it is already addressed by sections 273(d)(4)[548] and 273(d)(5).[549] These provisions, they state, establish "reasonable. and nondiscrimiitory" procedures for Bellcore and non-accredited standards development organizations to follow in creating industry-wide standards and generic requirements for telecommunications equipment and CPE.[550] Congress, Bellcore asserts, did not purposefully create a process under section 273(d)(4) only to prevent BOCs from using the fruits of that process in section 272.[551]

225. AT&T asserts that, in appropriate cases, the Commission should involve itself in the standard-setting process.[552] Similarly, MCI proposes that the Commission act as or appoint an arbitrator to resolve disputes that arise in the public standards-setting process.[553] USTA and U S West, on the other hand, argue that industry consensus rather than Commission involvement

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[546] MCI at 39 (the term "standards" should encompass any that affect interconnection and interoperability between two or more public network operators); Sprint at 42 (there is nothing to suggest that the term "standards" means something other than its commonly understood dictionary definition); TIA at 44 (the term "standards" should encompass all activities undertaken in connection with a BOC's efforts to establish technical specifications for BOC network operation and interconnection of equipment and services to a BOC network).

[547] Bellcore Reply at 2-3; ITAA at 21 (arguing that the nondiscrimination language of section 272(c)(1) is absolute); PacTel Reply at 18.

[548] Section 273(d)(4) prescribes procedures that are intended to open to all interested parties the process for setting and establishing industry-wide standards and generic requirements for telecommunicationequipment and CPE. See Manufacturing NPRM.

[549] Section 273(d)(5) requires that the Commission prescribe a dispute resolution process to be used if all parties cannot agree on a dispute resolution process when establishing and publishing any industry-wide standard or generic requirement. See Implementation of the Section 273(d)(5) of the Telecommunications Act of 1996. Dispute Resolution Regarding Equipment Standards, GC Docket No. 96-42, Report and Order, FCC No. 96-205 (rel. May 7, 1996) (Dispute Resolution Order).

[550] See Bellcore Reply at 2-3; PacTel Reply at 18.

[551] Bellcore Reply at 3.

[552] AT&T at 35.

[553] MCI at 40.

is required in the development of standards.[554] MCI contends that, as a matter of policy, BOCs should be required to participate in all public fora that are developing interconnection or interoperability standards concerning their current or foreseeable services and that all technical standards involving the BOCs or their affiliates should be developed in open, nondiscriminatory public standard-setting bodies and fora.[555] PacTel and Sprint, in contrast, assert that participation in standard-setting bodies should not be required.[556]

226. Sprint argues, however, that a BOC's failure to participate or its refusal to abide by the standards selected may be evidence of its intent to discriminate in the "establishment of standards."[557] Similarly, AT&T maintains that the Commission should treat the adoption of a standard that favors a BOC affiliate and harms unaffiliated entities as establishment of a prima facie case of discrimination under section 272(c)(1).[558] In addition, MCI argues that the Commission should refuse to recognize standards not established in an open, nondiscriminatory forum for purposes of resolving discrimination claims.[559]

3. Discussion

227. We conclude that the term "standards" in section 272(c)(l) includes the meaning of this term as it is used in section 273. In the Manufacturing NPRM, we sought comment on how the term "standards" should be defined "for purposes of implementation of the 1996 Act to ensure that standards processes are open and accessible to the public."[560] We note, however, that unlike the use of the term "standards" in sections 273(d)(4) and 273(d)(S), the term "standards" in section 272(c)(l) is not limited by the term "industry-wide." We conclude, therefore, that

[554] USTA Reply at 12-13 (in an era of open competition where BOCs compete against each other, BOCs have no incentive to collaborate with other BOCs in setting standards); U S West Reply at 14 (asserting that the Commission's complaint procedures should address any abuse of this process).

[555] MCI at 39; see also ITI and ITAA Reply at 14 (Commission should require BOCs to establish fair and nondiscriminatory network performance, interconnection, and equipment interoperability standards); TIA at 43 (BOCs should be strongly encouraged, if not required, to participate in standard-setting activities of accredited standard-setting groups.)

[556] PacTel at 35; PacTel Reply at 18; Sprint at 43 n.31.

[557] Sprint at 43 n.3 1.

[558] AT&T at 35.

[559] MCI at 39.

[560] Manufacturing NPRM at ¶ 34.

section 272(c)(1) prohibits discrimination in the establishment of any standard, not only those that are "industry-wide."[561]

228. As we observed in the Manufacturing NPRM, the process by which standards are established may present opportunities for anticompetitive behavior by the BOCs.[562] We decline, however, to implement additional procedures, beyond those outlined in section 273, to ensure that BOCs do not discriminate between their section 272 affiliates and other entities in establishing industry-wide standards. Rather, we agree with Bellcore and PacTel that the procedures for the establishment of industry-wide standards and generic requirements for telecommunications equipment and CPE appear at this time to be adequately addressed by the requirements contained in section 273(d)(4). For example, in response to MCI, we note that section 273(d)(4) already provides for an open standards-setting process whereby all interested parties have the opportunity to fund and participate in the development of industry-wide standards or generic requirements on a "reasonable and nondiscriminatory" basis."[563] We fmd no basis in the record for concluding that the requirements established by section 273, and any regulations adopted thereunder, will not be sufficient to deter discrimination in the establishment of industry-wide standards.

229. Although we decline at this time to establish additional procedures beyond those required in section 273(d)(4), we recognize that there is a distinct potential competitive danger that a BOC will use standards in its own and its section 272 affiliate's network that are not "industry-wide" (that is, not employed by "at least 30 percent of all access lines") or established by an accredited standards development organization,[564] but rather specifically tailored to meet its own needs or those of its section 272 affiliate. Because such standards may not be developed in an open and nondiscriminatory process, such as the one required for the establishment of industry-wide standards in section 273(d)(4), we fmd that those standards may place unaffiliated entities at a competitive disadvantage. For example, if a BOC adopts a particular non-accredited or non-industry-wide protocol or network interface, it may, by virtue of its substantial size and market share, effectively force competing entities to alter their specifications in order to maintain the same level of interoperability with the BOC or the BOC affiliate. We conclude, therefore, that the adoption of any standard that has the effect of favoring the BOC's section 272 affiliate and disadvantaging an unaffiliated entity will establish a prima facie violation of section 272(c)(l).

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[561] The term "industry-wide" as defined in section 273 means "activities funded by or performed on behalf of local exchange carriers for use in providing wireline telephone exchange service whose combined total of deployed access lines in the United States constitutes at least 30 percent of all access lines deployed by telecommunications carriers in the United States" as of February 8, 1996. See 47 U.S.C. § 273(d)(8)(C).

[562] Manufacturing NPRM at ¶ 31.

[563] See 47 U.S.C. § 273(d)(4)(A)(ii).

[564] An "accredited standards development organization" is an entity composed of industry members that has been accredited by an institution vested with the responsibility for standards accreditation by the industry. See 47 U.S.C. § 273(d)(S)(E).

230. We also conclude, on the basis of the record before us, that it is not necessary as a matter of law, nor desirable as a matter of policy, to require BOC participation in the standards-setting process. The language of section 272(c)(1) cannot be read as requiring such participation; moreover, BOCs have an interest in participating voluntarily in standard-setting organizations because standards that are ultimately adopted may materially impact the BOCs' competitive position.[565] Further, we decline to become involved at this time in the standard-setting process, as suggested by AT&T, in order to accomplish the purposes of section 272(c)(1). Unlike section 256, which, among other things, permits the Commission to participate in the development of public telecommunications network interconnectivity standards that promote access, section 272(c)(1) does not contemplate Commission involvement.[566] Moreover, we reject MCI's proposal that we insert ourselves into the dispute resolution process to accomplish the purposes of section 272(c)(l). Section 273(d)(5) requires the Commission to prescribe a dispute resolution process to address the anticompetitive harms that may result from the establishment of industry-wide standards under section 273(d)(4) and expressly prohibits the Commission from becoming a party to this process.[567] As to disputes that may arise in the context of other public standard-setting processes, we find, on the basis of the record before us, that Commission involvement beyond its existing role in the section 208 complaint process is unnecessary.[568]

E. Procurement Procedures

1. Background

231. Section 272(c)(l) also prohibits the BOCs from discriminating between their section 272 affiliates and other entities in their procurement of goods, services, facilities, and information. In the Notice, we observed that this provision prohibits a BOC from purchasing manufactured network equipment solely from its affiliate, purchasing the equipment from the affiliate at inflated prices, or giving any preference to the affiliate's equipment in the procurement process and thereby excluding rivals from the market in the BOC's service area. We sought comment on how the BOCs could establish nondiscriminatory procurement procedures designed to ensure that other entities are treated on the same terms and conditions as a BOC affiliate. We

[565] Cf. PacTel at 35.

[566] See 47 U.S.C. § 256. We note that the Commission has asked its federal advisory committee, the Network Reliability and Interoperability Council, for recommendationson how the Commission should implement section265 These recommendations will provide the basis for a notice of proposed rulemaking that will consider, among other things, Commission rules and policies dealing with telecommunications standards-setting activities, including Commission involvement.

[567] See 47 U.S.C. § 273(d)(S); Dispute Resolution Order.

[568] See U S West Reply *at 14* (if process is abused, Commission's complaint procedures are available to address the problem).

invited comment, specifically, on the nature and extent of rules necessary to ensure that such procedures are implemented.[569]

2. Comments

232. PacTel and U S West maintain that, in light of the procurement standards set forth in sections 273(e)(1) and 273(e)(2), it is unnecessary to adopt additional procurement procedures to implement the nondiscrimination requirement of section 272(c)(1).[570] ITAA asserts that, because the section 272(c)(l) language is absolute, it is unnecessary to prescribe procurement procedures to ensure that BOCs do not discriminate.[571] TIA, in contrast, contends that section 272(c)(1) requires BOCs to establish specific procurement procedures.[572] According to TIA, each BOC should specify the standards that it uses to make procurement decisions and file these with the Commission.[573] TIA also suggests that the Commission adopt a classification scheme that identifies discrete categories of products and related services procured by BOCs.[574]

3. Discussion

233. As stated above, we find that section 272(c)(1) establishes an unqualified prohibition against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities.[575] We conclude, therefore, that any discrimination with respect to a BOC's procurement of goods, services, facilities, or information between its section 272 affiliate and au unaffiliated entity establishes a prima facie case of discrimination under section 272(c)(l). For example, consistent with our observations in the Notice, we find that a prima facie case of discrimination under section 272(c)(l) may be established if a BOC purchases manufactured network equipment solely from its section 272 affiliate, purchases such equipment from its affiliate at inflated prices, or gives any preference to the affiliate's equipment in the procurement process, thereby excluding rivals from the market in the BOC's service area.

234. Insofar as section 272(c)(l) governs a BOC's procurement of manufacturing services, we find that BOC procurement of telecommunications equipment should be performed in a manner consistent with the manufacturing requirements of section 273. We conclude,

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[569] Notice at ¶ 77.

[570] PacTel at 35; PacTel Reply at 17; U S West at 36 n.58.

[571] ITAA at 21.

[572] TIA at 46.

[573] Id. at 41-42.

[574] Id. at 34 n.74 (noting that its own "Buyer's Guide" may be useful in this process).

[575] See supra at paragraph 197.

therefore, that section 272(c)(l) requires a BOC to adhere to the nondiscrimination and procurement standards governing the procurement of telecommunications equipment set forth in sections 273(e)(l) and 273(e)(2) of the Act. [576] We therefore defer consideration of detailed procurement procedures with respect to telecommunications equipment to the Manufacturing NPRM, which specifically addresses the requirements of these sections. We conclude, however, that the BOCs must, at a minimum, comply with any and all regulations adopted to implement the standards of sections 273(e)(l) and 273(e)(2); failure to do so may be evidence of discrimination under section 272(c)(1).

235. We recognize, however, that the nondiscrimination requirement of section 272(c)(1) encompasses a broader range of activities than those described in sections 273(e)(1) and 273(e)(2). Nevertheless, because the record is largely silent on the nature and extent of rules necessary to ensure that BOCs do not discriminate in their procurement of goods, services, facilities, and information under section 272(c)(l), we decline, at this time, to adopt rules to implement this requirement. In response to TIA's concerns, therefore, we conclude that the record in this proceeding does not support adoption of any concrete procurement procedures beyond those already man&ted by sections 273(e)(l) and 273(e)(2). Although we decline to issue rules, we caution BOCs that allegations of discrimination in their procurement of goods, services, facilities, and information under section 272(c)(l) will be evaluated in light of that section's unqualified prohibition on discrimination. Further, we note that allegations of discrimination may more easily be rebutted by demonstrated compliance with pm-existing, publicly available procedures for procurement.

F. Enforcement of Se&ion 272(c)(l)

236. In the Notice, we observed that the Commission previously adopted a regulatory scheme to ensure that the BOCs do not discriminate in the provision of basic services used to provide enhanced services or in disclosing changes in the network that are relevant for the competitive manufacture of CPE. We sought comment on whether any of the reporting and other requirements that the Commission applied to the BOCs in the Computer III and ONA proceedings, which were adopted in lieu of the structural separation requirements of Computer II, are sufficient to implement section 272(c)(l) and provide protection against the type of BOC behavior that section 272(c)(l) seeks to curtail.[577] We address this issue, as well as the

[576] Section 273(e)(l), entitled "Nondiscrimination Standards for Manufacturing" requires, inter alia, that "[i]in the procurement or awarding of supply contracts for telecommunications equipment, a [BOC], or any entity acting on its behalf. . . may not discriminate in favor of equipment produced or supplied by an affiliate or related person. Section 273(e)(2), entitled "Procurement Standards," provides that each BOC or entity acting on its behalf shall "make procurement decisions and award all supply contracts for equipment, services, and software on the basis of an objective assessment of price, quality, delivery, and other commercial factors." 47 U.S.C. §§ 273(e)(l)(B), (e)(2).

[577] Notice at ¶ 75.

requirements and mechanisms necessary to facilitate the detection and adjudications of section 272 violations, below.?'

VI. FULFILLMENT OF CERTAIN REQUESTS PURSUANT TO SECTION 272(e)

A. Section 272(e)(l)

1. Background

237. Section 272(e)(l) states that a BOC and a BOC affiliate subject to section 251(c) "shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates."[579] In the Notice, we tentatively concluded that the term "unaffiliated entity" includes "any entity, regardless of line of business, that is not affiliated with a BOC" as defined under section 153(1) of the Act.[580] We sought comment on the scope of the term "requests" and on whether it included, inter alia, "initial installation requests, as well as any subsequent requests for improvement, upgrades or modifications of service, or repair and maintenance of. . . services."[581] We tentatively concluded that section 272(e)(1) requires the BOCs to treat unaffiliated entities on a nondiscriminatory basis in completing orders for telephone exchange service and exchange access, but does not grant unaffiliated entities any additional rights beyond those otherwise granted by the Communications Act or Commission rules.[582] We also sought comment regarding how to implement section 272(e)(1) and specifically inquired whether reporting requirements for service intervals analogous to those imposed by Computer III and ONA would be sufficient.[583]

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[578] See infra part IX.

[579] 47 U.S.C. § 272(e)(l). Section 272(e) applies to a BOC or a BOC affiliate subject to section 251(c). 47 U.S.C. § 272(e). An affiliate subject to section 251(c) is an incumbent LECs as defined in section 251(h). Id. §§ 251(c), 251(h).

[580] Notice at ¶ 82.

[581] Id. at ¶ 83.

[582] Id. at ¶ 84.

[583] Id. at ¶ 85.

2. Comments

238. Commenters generally support the Notice's analysis regarding the scope and purpose of section 272(e)(1).[584] AT&T, Sprint, MCI, TRA, Teleport, and ITAA support the imposition of reporting requirements to implement section 272(e)(1),[585] while BOCs generally oppose the imposition of reporting requirements.[586] Several parties question the utility of reporting that follows the format of Commuter III and ONA reporting.[587] In an ex parte letter filed after the official pleading cycle closed, AT&T suggests an alternative format for reporting based on measures it currently uses to monitor the quality of access services provided to it by various LECs.[588]

3. Discussion

239. Based on our analysis of the record, we adopt our tentative conclusion that the term "unaffiliated entity" includes "any entity, regardless of line of business, that is not affiliated with a BOC" as defined under section 153(1) of the Act.[589] Also based on the record, we conclude that section 272(e)(l) requires the BOCs to treat unaffiliated entities on a nondiscriminatory basis in completing orders for telephone exchange service and exchange access, but does not grant unaffiliated entities any additional rights to make requests beyond those granted by the Communications Act or Commission rules.[590] We conclude that the term "requests" should be interpreted broadly, and that it includes, but is not limited to, initial

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[584] E.g., AT&T at 37; MCI at 41-42; Sprint at 43-44; TRA at 17; ITAA at 23; TIA at 45; PacTel at 36.

[585] AT&T at 37; MCI at 42; Sprint at 44 & n.32; TRA at 17-18; Teleport at 13-15; ITAA at 23.

[586] E.g., Ameritech Reply at 30; Bell Atlantic Reply at 11-12; NYNEX Reply at 23 & n.72; SBC at 13-17; U S West Reply at 16; PacTel Reply at 1 8- 19. NYNEX and Ameritech specifically argue that reporting is not needed because their internal procedures are automated and designed to be nondiscriminatory, and that therefore, discrimination would require expensive coordination by the BOCs. Letter from Suzanne Guyer, Executive Director, Federal Regulatory Policy Issues, NYNEX to William F. Caton, Acting Secretary, FCC at 5 (filed Oct. 23, 1996) (NYNEX Oct. 23 Ex Parte); Letter from Gary L. Phillips, Director of Legal Affairs, Washington Office, Ameritech to William F. Caton, Acting Secretary, FCC, Attachment (filed Oct. 23, 1996) (Ameritech Oct. 23 Ex Parte).

[587] AT&T at 36-37; PacTel at 37; Time Warner at 23.

[588] Letter from Charles E. Griffin, Government Affairs Regulatory Director, AT&T to William F. Won, Acting Secretary, FCC at 3-5 (filed Oct. 3, 19%) (AT&T Oct. 3 Ex Parte). This proposal is discussed more fully infra in part Xl.

[589] E.g., Sprint at 36-37; TRA at 17; TIA at 45.

[590] E.g., PacTel at 36; Sprint at 43-44.

installation requests, subsequent requests for improvement, upgrades or modifications of service, or repair and maintenance of these services.[591]

240. Section 272(e)(l) unambiguously states that a BOC must fulfill requests from unaffiliated entities at least as quickly as it fulfills its own or its affiliates' requests. To implement this statutory directive, we conclude that, for equivalent requests, the response time a BOC provides to unaffiliated entities should be no greater than the response time it provides to itself or its affiliates.[592] We are not persuaded by the BOCs' argument that variations among individual requests make any comparison between requests meaningless, and thus make such a standard unachievable.[593] The BOC must fulfill equivalent requests within equivalent intervals. Thus, for example, an unaffiliated entity's request of a certain size, level of complexity, or in a specific geographic location must be fulfilled within a period of time that is no longer than the period of time in which a BOC responds to an equivalent request from itself or its affiliates. Because we anticipate that the facts relating to each request will vary, we believe it is appropriate to determine whether requests are equivalent on a case-by-case basis.

241. Section 272(e)(l) requires a BOC to fulfill the requests of unaffiliated entities within a period no longer than the period in which it fulfills its own or its affiliates requests. Because the statute does not mandate that a BOC follow a particular procedure in meeting this requirement, we decline to adopt the proposals of AT&T and Teleport to require the BOCs to use electronic order processing systems or to use the identical systems that the BOCs use to process their own service requests.[594] We emphasize, however, regardless of the procedures that a BOC employs to process service orders from unaffiliated entities, it must he able to demonstrate that those procedures meet the statutory standard. Under current industry practice, BOCs and interexchange carriers use electronic mechanisms to implement PIC changes;[595] exchange billing information; and, in some instances, provide ordering, repair, and trouble administration information.[596] We believe that these current mechanisms, and the requirement that incumbent LECs provide nondiscriminatory access to operation support systems functions pursuant to

[591] AT&T at 37; MCI at 41-42; Sprint at 4344; TRA at 17; ITAA at 23.

[592] AT&T at 36-38. Contra Bell Atlantic Reply at 11; Ameritech Reply at 30.

[593] Ameritech Reply at 30; Bell Atlantic Reply at 11-12; NYNEX Reply at 23; U S West Reply at 16.

[594] AT&T at 38; Teleport at 13.

[595] A PIC change is a change in a customer's selection of her presubscribed interexchange carrier. At one time the term "PIC" referred to "primary*' or "preferred interexchange carrier." Although we have retained the acronym "PIC," we now defme it as any toll carrier for purposes of our presubscription rules under the Second Interconnection Order. Second Interconnection Order at ¶ 5, n. 15.

[596] See First Interconnection Order at ¶¶ 507, 511-512, 520 (describing the use of automated PIC changes, electronic ordering and repair and trouble administration information, the Customer Account Record Exchange (CARE) system, and the Billing Name and Address (BNA) database).

sections 25 1 (c)(3) and 25 1 (c)(4) of the Act, will promote the use of electronic interfaces between unaffiliated entities and the BOCs.[597]

242. We also conclude that the BOCs must make available to unaffiliated entities information regarding the service intervals in which the BOCs provide service to themselves or their affiliates. The statute imposes a specific performance standard on the BOCs in section 272(e)(l), and we conclude that, absent Commission action, the information necessary to detect violations of this requirement will be unavailable to unaffiliated entities. Unlike the information necessary to ensure compliance with other subsections of section 272, there is no requirement that the information necessary to verify compliance with section 272(e)(l) must be disclosed under other provisions of the Act or Commission rules. Without the disclosure requirements imposed here, parties will be unable readily to ascertain how long it takes a BOC to fulfill its own or its affiliates' requests for service. Section 272(b)(5), which requires that all transactions between a BOC and its section 272 affiliate be reduced to writing and made available for public inspection, does not provide parties an adequate mechanism to obtain information necessary to evaluate compliance with section 272(e)(l) because section 272(b)(5) is necessarily prospective in nature. The information disclosed pursuant to section 272(b)(5) will allow unaffiliated entities to determine. that a BOC and its section 272 affiliate have reached an agreement and the relevant terms and conditions of that agreement, but the document produced to satisfy section 272(b)(5) will not allow parties to determine the time it actually takes for a BOC to fulfill its own or it affiliates' requests. Section 272(e)(l) governs actual BOC performance, not contractual arrangements. Moreover, section 272(b)(5) by itself is insufficient to implement section 272(e)(1) because it will only make information available about transactions between a BOC and its section 272 affiliate; section 272(e)(l), in contrast, governs requests by the BOC itself and all of the BOC's affiliates. We also conclude that, in order to provide meaningful enforcement of section 272(e)(l), interval response times must be disclosed more frequently than the biennial audit required by section 272(d). Finally, a disclosure obligation will allow all entities to compare, in a timely fashion, their own service intervals with those provided to the BOC or its affiliates.[598] Contrary to the contentions of some BOCs, vendor management programs similar to the one utilized by AT&T would not provide this information.[599] These vendor management programs provide information to a BOC customer about the service intervals the BOC provides to that customer, but do not provide comparative data about the service intervals provided to other entities, such as BOC affiliates.

[597] First Interconnection Order at ¶¶ 312, 516-528.

[598] As we indicate below, we are seeking additional comment before adopting the specific requirements of the disclosure obligation we impose in this Order.

[599] See, e.g., Letter from Cyndie Eby, Executive Director, Federal Regulatory, U S West to Cheryl Leanza, Policy and Program Planning Division, Common Carrier Bureau, FCC at 2 (filed Nov. 19, 19%) (U S West Nov. 19 Ex Parte); Bell Atlantic Oct. 16 Ex Parte at 1-2.

243. We do not agree with PacTel that the absence of discrimination found in ONA reports indicates that disclosure requirements are of little value in enforcing section 272(e)(1).[600] Disclosure requirements are valuable because they promote compliance and give aggrieved competitors a basis for seeking a remedy directly from a BOC. If competitors can easily obtain data about a BOC's compliance with section 272(e)(l), this increases the likelihood that potential discrimination can be detected and penalized; this, in turn, decreases the danger that discrimination will occur in the first place. Disclosure requirements also minimize the burden on the Commission's enforcement process because entities will have the information needed to resolve disputes informally prior to submitting a complaint to the Commission. We also are not persuaded by NYNEX and Ameritech that the automation and nondiscriminatory design of their provisioning and maintenance procedures obviate the need for disclosure requirements.[601] Although the BOCs' use of nondiscriminatory, automated order processing systems is important for meeting the requirements of section 272(e)(l), the existence of these systems does not guarantee that requests placed via these systems are actually completed within the requisite period of time. Finally, we are not persuaded by the arguments of U S West and PacTel that, because parties are able to incorporate information disclosure requirements into agreements negotiated under sections 251 and 252 of the Act, a separate information disclosure requirement is unnecessary.[602] Section 272(e)(l) and section 251 do not govern similar activities. Section 251 provides a framework that requires incumbent LECs to provide, inter alia, interconnection, unbundled network elements, and wholesale services to requesting telecommunications carriers. In contrast, section 272(e)(1) requires BOCs to fulfill requests for telephone exchange service and exchange access from unaffiliated entities on a nondiscriminatory basis. To link compliance with section 272(e)(l) to the outcome of individual negotiations would not adequately implement section 272(e)(1), particularly because the class of entities entitled to nondiscriminatory treatment under section 272(e)(l) is much broader than the class of entities who may make requests under section 251.

244. In response to the comments raised in the record, we conclude that we should seek further comment on the specific information disclosure requirements proposed by AT&T in an Ex parte letter filed after the official pleading cycle closed.[603] We seek further comment on whether reporting requirements analogous to the Commuter III and ONA reporting requirements would be sufficient to implement section 272(e)(l). The parties are divided about the usefulness of service interval reporting similar to ONA reporting for implementing section 272(e)(1)[604] and on the merits of AT&T's proposal.[605] We agree with NYNEX that we should

[600] PacTel at 37.

[601] NYNEX Oct. 23 Ex Parte at 5; Ameritech Oct. 23 Ex Parte, Attachment.

[602] U S West Nov. 19 Ex Parte at 2-3; PacTel Oct. 18 Ex Parte at 4.

[603] AT&T October 3 Ex Parte at 3-6.

[604] See supra note 588.

provide an additional opportunity for parties to comment on the specific aspects of the disclosure requirements needed to implement section 272(e)(l); therefore, we include a Further Notice of Proposed Rulemaking infra in Part XI of this Order.[606]

245. We reject at this time, however, AT&T's more expansive proposal to require BOCs to submit to the Commission the underlying data for the information they must make publicly available.[607] The submission of data necessary to meet this requirement -- including, for example, every trouble report submitted to a BOC for a given period -- would impose a substantial administrative burden on the BOCs, and possibly on the Commission as well, and is unnecessary to enforce section 272(e)(l). We also decline to order the BOCs to publicize the response times for all entities, as suggested by AT&T and Teleport, because the standard established by section 272(e)(l) is the response time given to the BOC itself and its affiliates.[608]

B. Section 272(e)(2)

1. Background

246. Section 272(e)(2) states that a BOC and a BOC affiliate that is subject to section 251(c) "shall not provide any facilities, services, or information concerning its provision of exchange access to [a section 272(a) affiliate] unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions."[609] In the Notice, we sought comment on the scope of the term "facilities, services, or information concerning its provision of exchange access" and the term "other providers of

[605] A number of other parties have also submitted Ex Parte letters in response to AT&T's proposal. See Letter from Teresa Marrero, Regulatory Affairs, Teleport Communications Group to Regina Keeney, Chief, Common Carrier Bureau, FCC (filed Oct. 8, 1996) (Teleport Oct. 8 Ex Parte); Letter from Edward Shakin, Regulatory Council, Bell Atlantic to Cheryl A. Leanza, Policy and Program Planning Division, Common Carrier Bureau, FCC (filed October 16, 1996) (Bell Atlantic Oct. 16 Ex Parte); Letter from Gina Harrison, Director, Federal Regulatory Relations, Pacific Telesis Group Washington to William F. Caton, Acting Secretary, FCC (filed Oct. 18, 1996) (PacTel Oct. 18 Ex Parte); Ameritech Oct. 23 Ex Parte; NYNEX Oct. 23 Ex Parte; Letter from Gina Harrison, Director, Federal Regulatory Relations, Pacific Telesis Group Washington to William F. Caton, Acting Secretary, FCC (filed Oct. 23, 19%) (PacTel Oct. 23 Ex Parte); Letter from Teresa Marrero, Regulatory Affairs, Teleport Communications Group to Regina Keeney, Chief, Common Carrier Bureau, FCC (filed Oct. 24, 1996) (Teleport Oct. 24 Ex Parte); Letter from Charles E. Griffin, Government Affairs Regulatory Director, AT&T to William F. Caton, Acting Secretary, FCC (filed Oct. 24, 1996) (AT&T Oct. 24 Ex Parte).

[606] NYNEX Oct. 23 Ex Parte at 6.

[607] AT&T at 37; AT&T Oct. 3 Ex Parte at 6.

[608] See AT&T Oct. 3 Ex Parte at 6; Teleport Oct. 8 Ex Parte at 8. Ameritech supports disclosures regarding the service intervals provided to BOC affiliates rather than to individual competing carriers. Ameritech Oct. 23 Ex Parte, Attachment.

[609] 47 U.S.C. § 272(e)(2); see supra note 580.

interLATA services in that market."[610] We also sought comment on the relevance of the MFJ and prior Commission proceedings, including our equal access rules, in implementing this provision.[611]

2. Comments

247. Several parties suggest that the nondiscrimination obligation imposed on a BOC by section 272(e)(2) extends to ISPs.[612] U S West indicates that the term "in that market" implies a geographic limitation coextensive with the geographic territory served by a BOC affiliate.[613] BOCs generally argue that implementing regulations under section 272(e)(2) are unnecessary.[614] AT&T, on the other hand, favors specific public disclosure requirements to implement section 272(e)(2).[615] Parties also disagree over the relevance of MFJ and Commission precedent when interpreting this provision.[616]

3. Discussion

248. Definitional issues. We conclude that section 272(e)(2) does not require a BOC to provide facilities, services, or information concerning its provision of exchange access to ISPs, as suggested by ITAA and MFS.[617] Although ISPs are included within the term "other providers of interLATA services,"[618] ISPs do not use exchange access as it is defined by the Act, and, therefore, section 272(e)(2)'s requirement that BOCs provide exchange access on a

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610 Notice at ¶ 86.

611 Notice at ¶¶ 86-87 & n.160.

612 ITAA at 24-25; MFS at 27-28. Contra U S West at 40-41.

613 U S West at 41.

614 USTA at 31-33.; Ameritech Reply at 30-31; PacTel at 31.

615 AT&T at 39. Contra Sprint at 41 (network disclosure rules under section 25 1(c)(5) are sufficient). See also IDCMA at 6-7 (requesting rules for manufacturers).

616 Compare MCI at 42-43 (supporting the use of MFJ precedent) with U S West at 41-42 (arguing the Commission should consider its own precedent in this area, but should not consider the relevance of the MFJ).

617 ITAA at 24-25 (arguing that the Commission must apply section 272(e) to information services providers because section 272(f)(2) applies to information services and specifically exempts section 272(e), thus implying that section 272(e) protects information services providers); MFS at 27-28 (section 272(e)(2) extends the requirements of section 25 1, including physical collocation, to ISPs because section 272(e)(2) requires nondiscriminatory treatment of "other providers of interLATA services"). Contra U S West at 40 (because section 272(e)(2) applies only to exchange access it seems logical that section 272(e)(2) requires nondiscriminatory treatment of the "providers of interLATA services" who are most affected by the terms and conditions of exchange access).

618 See supra part III.A. 1.

nondiscriminatory basis is not applicable to ISPs. "Exchange access" is defined as "the offering of access to telephone exchange services or facilities. for the purpose of the origination or termination of telephone toll services."[619] "Telephone toll service" is defined, in turn, as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[620] This definition makes clear that "telephone toll service" is a "telecommunications service." Therefore, by definition, an entity that uses "exchange access" is a telecommunications carrier.[621] &cause ISPs do not provide telephone toll services, and therefore are not telecommunications carriers, they arc not eligible to obtain exchange access pursuant to section 272(e)(2).[622]

249. We are not persuaded by ITAA's argument that, because section 272(f)(2) states that the requirements of section 272 cease to apply with respect to interLATA information services at sunset, but exempts section 272(e) from the sunset requirement, section 272(e), including section 272(e)(2), must apply to ISPs. Section 272(f)(2) cannot be read to extend the application of section 272(e)(2) beyond its express terms. Similarly, we reject MFS's argument that we should use section 272(e)(2) to grant ISPs rights under section 251 because, as we articulated above, this would expand the scope of section 251 beyond its express limitations.[623]

250. We agree with U S West that the term "in that market" is intended to ensure that, to benefit from section 272(e)(2), an interLATA provider must be operating in the same geographic area as the relevant BOC affiliate. Therefore, we conclude that the term "providers of interLATA services in that market" means any interLATA services provider authorized to provide interLATA service in the same state where the relevant section 272 affiliate is providing service. We have designated a state as the relevant geographic area for purposes of section 272(e)(2) because the BOCs will obtain authorization to provide interLATA services on a state-by-state basis.

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[619] 47 U.S.C. §153(16).

[620] Id. § 153(48).

[621] See 47 U.S.C. §153(44) (defining "telecommunications carrier". as, inter alia, a provider of telecommunications services). Our conclusion that ISPs do not use exchange access is consistent with the MFJ, which recognized a difference between "exchange access" and "information access." MFJ §§ IV(F), IV(I) in United States v. Western Elec. Co., 552 F. Supp. at 228-29 (exchange access is used in connection with interexchange telecommunications while information access is used in connection with information services). Because the requirement that the BOCs provide ISPs with "information access" under the MFJ is preserved under section 251(g), ISPs will continue to be able to obtain the services they require on a nondiscriminatory basis. 47 U.S.C. § 251(g). For more detail regarding section 251(g), see infra paragraph 25 1 and note 626.

[622] As we explain above, interLATA information service providers use telecommunications to provide interLATA information services, but they do not use telecommunications services. See supra part III.A.l.

[623] See supra paragraph 220.

251. Implementation of section 272(e)(2). In light of the protections imposed in other portions of the Act and our rules, we conclude that we do not need to adopt rules to implement section 272(e)(2) at this time. In our First Interconnection Order and Second Interconnection Order, we adopted rules implementing section 251 of the Act, which address, inter alia, the provision of exchange access and network disclosure requirements under the Act.[624] In addition, section 25 l(g) of the Act preserves the equal access requirements in place prior to the passage of the 1996 Act, including obligations imposed by the MFJ and any Commission rules.[625] If, in the future, it appears that additional rules are necessary to enforce the requirements of section 272(e)(2), we will take action at that time.

252. We conclude that a separate disclosure requirement under section 272(e)(2) is not warranted.[626] Section 272(b)(5) requires that all transactions between a BOC and its section 272 affiliate be reduced to writing and made available for public inspection.[627] Parties will be able to determine the specific services and facilities that a BOC provides to its section 272 affiliate by inspecting the documentation that must be maintained pursuant to section 272(b)(5). In addition, information about a BOC's provision of exchange access to itself or to its affiliates will be available through the information disclosure requirement we are imposing pursuant to section 272(e)(1).[628] Accordingly, we reject AT&T's suggestion that the Commission require the BOCs

[624] First Interconnection Order at ¶¶ 186-191, 342-365 (concluding that a requesting carrier may obtain interconnection to originate and terminate interexchange traffic under section 25 l(c)(2) only if it is offering exchange access to others, not for the purpose of originating and terminating its own traffic, but that a requesting carrier may request unbundled elements under section 251(c)(3) in order to provide itself with exchange access); Second Interconnection Order at ¶¶ 165-240 (imposing network disclosure requirements).

[625] 47 U.S.C. § 25 l(g). Under the MFJ the BOCs were required to "provide to ail interexchange carriers and information service providers exchange access, information access and exchange services far such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates." MFJ § II(A), in United States v. Western Elec. Co., 552 F. Supp. at 227. Equal access included the nondiscriminatory provision of exchange access services, dialing parity, and presubscription of in&exchange carriers. MFJ § IV(F), app. B in United States v. Western Elec. Co., 552 F. Supp. at 228,233. Exchange access services included, but were not limited to, "provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, directory services, testing and maintenance of facilities, and the provision of information necessary to bill customers." Id. GTE became subject to similar restrictions in 1984, United States v. GTE Corn., 603 F. Supp. 730 (D.D.C. 1984), and, in 1985 the Commission imposed restrictions on independent LECs similar to those imposed on GTE. MTS and WATS Market Structure Phase III, CC Docket No. 78-72, Report and Order, 100 FCC 2d 860, 874-878, ¶¶ 47-60 (1983) (subsequent history omitted); see also Michael K. Kellogg et al, Federal Telecommunications Law 275-77, § 5.5.1 (1992); First Interconnection Order at ¶ 362.

[626] Ameritech Reply at 30-3 1.

[627] 47 U.S.C. § 272(b)(5).

[628] See supra paragraph 242.

to disclose publicly all exchange access services and facilities used by their interLATA affiliates and to update these disclosures whenever upgrades are made.[629]

253. We conclude that our current network disclosure rules are sufficient to meet the requirement of section 272(e)(2) that BOCs disclose any "information concerning . . . exchange access" on a nondiscriminatory basis.[630] Therefore, we conclude that AT&T's suggestion that the Commission mandate additional technical disclosure requirements is unnecessary.[631] Section 25 1 (c)(S) imposes on incumbent LECs "[t]he duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks."[632] We have adopted detailed rules specifying how this requirement is to be implemented.[633] Further, the Commission's prior network disclosure requirements are still in place, including the Comnuter II "all carrier rule"[634] and the Computer III network disclosure requirements.[635] We emphasize that if a BOC preferentially disclosed information to its section 272 affiliate or withheld information from competing providers of interLATA services, that BOC would be in violation of section 272(e)(2). Our rules implementing section 251(c)(5) explicitly prohibit this behavior: they require LECs to make network disclosures according to a specific timetable, and prohibit preferential disclosures in advance of that timetable.[636] We do not address IDCMA's concerns regarding information

[629] AT&T at 38-39.

[630] Sprint at 41. These rules are cited infra at notes 633-637.

[631] AT&T at 39 (arguing that the Commission should prohibit the BOCs from making any technical information available to their affiliates unless it is provided in written materials or technical references that are simultaneously provided to competitors).

[632] 47 U.S.C. § 251(c)(5).

[633] Second Interconnection Order at ¶¶ 165-240.

[634] 47 C.F.R. § 64.702.

[635] Computer III Phase II Reconsideration Order, 3 FCC Rcd at 1164, ¶ 116 (1988). Although the Ninth Circuit vacated this order, the Commission reimposed the network disclosure requirements on remand. BOC Safeguards Order, 6 FCC Rcd at 7602-7604 ¶¶ 68-70.

[636] In general, public notice is required under section 25 1(c)(5) at the "make/buy" point, but at a minimum of 12 months prior to implementation; if the planned changes can be implemented within 12 months of the make/buy point, public notice must be given at least six months prior to implementation. Second Interconnection Order at ¶¶ 214, 224.

disclosures for manufacturers because section 273 addresses the needs of manufacturers in detail, and we are addressing the implementation of section 273 in a separate proceeding.[637]

C. Section 272(e)(3)

1. Background

254. Section 272(e)(3) provides that a BOC and a BOC affiliate that is subject to the requirements of section 251(c) "shall charge [a section 272(a) affiliate], or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service."[638] In the Notice, we tentatively concluded that a section 272 affiliate's purchase of telephone exchange service and exchange access at tariffed rates, or imputation of tariffed rates to the BOC, would be sufficient to implement section 272(e)(3). We additionally sought comment regarding the appropriate mechanism to enforce this provision in the absence of tariffed rates.[639]

2. Comments

255. Commenters overwhelmingly support our tentative conclusion.[640] Several commenters indicate that the purchase of interconnection or unbundled elements at prices that are available on a nondiscriminatory basis from an agreement negotiated pursuant to sections 252, 25 l(c)(2) and (c)(3) would also satisfy section 272(e)(3).[641] Several parties suggest additional safeguards in addition to the use of tariffed rates.[642] MCI argues that, because access charges do not reflect costs, the requirements of section 272(e)(3) are meaningless if BOC affiliates are

[637] See IDCMA at 6-7 (arguing that current network disclosure rules are insufficient far manufacturers); Manufacturing NPRM.

[638] 47 U.S.C. § 272(e)(3); see supra note 580.

[639] Notice at ¶ 88. We also sought comment regarding the accounting safeguards necessary to implement this provision in our companion Accounting Safeguards NPRM, 11 FCC Rcd at 9091, ¶ 79, and address those requirements in the Accounting Safeguards Order at parts III.B.2.c and IV.B. 1 .b.

[640] E.g., Ameritech Reply at 31; Bell Atlantic, Exhibit 1 at 8-9; PacTel Reply at 20; USTA at 26-27; Sprint at 45; TRA at 18. Some parties support the Commission's tentative conclusion, but also argue additional regulations are necessary. E.g., AT&T 39-40; MCI at 43; ITAA at 26.

[641] ITAA at 26; Voice-Tel at 15- 16; Ameritech Reply at 3 l-32.

[642] AT&T at 40; ALTS at 5-6; MCI at 43-44.

allowed to price interLATA services below the price of access.[643] BOCs oppose these additional safeguards and reject MCI's argument.[644]

3. Discussion

256. We adopt our tentative conclusion that a section 272 affiliate's purchase of telephone exchange service and exchange access at tariffed rates, or a BOC's imputation of tariffed rates, will ensure compliance with section 272(e)(3). If a section 272 affiliate purchases telephone exchange service or exchange access at the highest price that is available on a nondiscriminatory basis under tariff, section 272(e)(3)'s requirement that a BOC must charge its section 272 affiliate an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carrier will be fulfilled. In addition, we conclude that other mechanisms are available under the Act to ensure that BOCs charge nondiscriminatory prices in accordance with section 272(e)(3). If a section 272 affiliate were to acquire services or unbundled elements from a BOC at prices that are available on a nondiscriminatory basis under section 25 1, the terms of section 272(e)(3) would be met.[645] To the extent that a statement of generally available terms filed pursuant to section 271 (c)(l)(B) would include prices that are available *on* a nondiscriminatory basis in a manner similar to tariffing, and a BOC's section 272 affiliate obtains access or interconnection at a price set forth in the statement, this would also demonstrate compliance with section 272(e)(3).[646] We address the appropriate allocation and valuation of these transactions for accounting purposes in our companion Accounting Safeguards Order.[647]

257. We further conclude that section 272(e)(3) requires that a BOC must make volume and term discounts available on a nondiscriminatory basis to all unaffiliated interexchange carriers. We do not agree, however, with those parties that suggest that additional requirements are necessary to implement section 272(e)(3). AT&T, for example, proposes that a BOC or section 272 affiliate pay "a price per unit of traffic that reflects the highest unit price that any

[643] MCI at 43-44.

[644] See e.g., Ameritech Reply at 31; Bell Atlantic Reply at 12-15; PacTel Reply at 20; U S West Reply at 16-17.

[645] ITAA at 26; Voice-Tel at 16; Ameritech Reply at 3 l-32. The Commission's pricing rules and interpretation of section 252(i) are currently under stay by the 8th Circuit Court of Appeals. Iowa Utilities Board v. FCC, No. 96-3321 (8th Cir. Oct. 15, 1996) (order granting stay pending judicial review).

[646] See First Interconnection Order at ¶¶ 130-132 (concluding that the Commission's rules under section 251 should be equally applicable to statements of generally available terms under section 271(c)(2)(B)). The Commission's pricing rules are currently under stay, by the 8th Circuit Court of Appeals. Iowa Utilities Board v. FCC.

[647] See Accounting Safeguards Order parts III.B.2.c and IV.B. 1 .b.

interexchange carrier pays for a like exchange or exchange access service."[648] We agree with the BOCs that AT&T's suggested rule would unfairly disadvantage BOC affiliates by preventing them from receiving volume discounts that other interexchange carriers with similar access traffic volumes would receive.[649] We agree with Ameritech that, because the provision of services that fall under section 272(e)(3) must either be tariffed or made publicly available under section 252(h), unaffiliated interexchange carriers will be able to detect discriminatory arrangements.[650] We recognize that a BOC may have an incentive to offer tariffs that, while available on a nondiscriminatory basis, are in fact tailored to its affiliate's specific size, expansion plans, or other needs. Our enforcement authority under section 271(d)(6) and section 208 are available to address this and other forms of potential discrimination by a BOC.

258. We reject MCI's proposal that the Commission review the BOC section 272 affiliates' prices, or profits, or both, to ensure that the section 272 affiliates' prices cover their access charges and all other costs.[651] MCI's contention that access charges are excessive is more appropriately addressed in the Commission's forthcoming proceeding on access charge reform.[652] We also note that the ability of competing carriers to acquire access through the purchase of unbundled elements (if those unbundled elements are properly priced) will increase pressure on the BOCs to decrease access charges, and will give competing carriers the opportunity to charge retail prices that reflect the lower cost of unbundled elements.[653] We interpret section 272(e)(3) to require the BOCs to charge nondiscriminatory prices, as indicated above, and to allocate properly the costs of exchange access according to our affiliate transaction and joint cost rules, as modified by our companion Accounting Safeguards Order.[654] We conclude that further rules addressing predatory pricing by BOC section 272 affiliates are not necessary because adequate mechanisms are available to address this potential problem. A BOC section 272 affiliate that charges a rate for interstate services below its incremental cost of providing such services would be in violation of sections 201 and 202 of the Act.[655] Federal antitrust law also would apply to

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[648] AT&T at 40 (in the alternative favoring a rule that any tariff that has the effect of giving a BOC or BOC affiliate a lower charge per unit of traffic than other interexchange carriers is presumptively invalid); cf. ALTS at 5 (arguing the Commission should require the BOCs to show that non-affiliates purchase at least 10% of a given tariff).

[649] Ameritech Reply at 3 1; Bell Atlantic Reply at 12; PacTel Reply at 20; U S West Reply at 16- 17.

[650] Ameritech Reply at 3 I-32.

[651] MCI at.43-44.

[652] Access Charge Reform NPRM; see First Interconnection Order at ¶¶ 716-732.

[653] See 47 U.S.C. § 252(d)(l)(A)(i). The Commission's pricing rules interpreting section 252(d)(l)(A)(i) are currently under stay by the 8th Circuit Court of Appeals. Iowa Utilities Board v. FCC.

[654] See Accounting Safeguards Order parts III.B.2.c and IV.B.1.b.

[655] See USTA Reply, Haussman Statement at 10.